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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

JOSE VIRELLA RIVERA, PABLO CANTRES and ANTONIO FALU BENITZ,
Plaintiffs-Respondents

—*against*—

REDERI A/B NORDSTJERNAN and AXEL AXELSON JOHNSON,
Defendants and Third Party Plaintiffs-Petitioners

—*against*—

INTERNATIONAL SHIPPING AGENCY, INC. and COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK,
Third Party Defendants-Respondents

JOSE VALDIVIA,
Plaintiff-Respondent

—*against*—

REDERI A/B NORDSTJERNAN and AXEL AXELSON JOHNSON,
Defendants and Third Party Plaintiffs-Petitioners

—*against*—

INTERNATIONAL SHIPPING AGENCY, INC. and COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK,
Third Party Defendants-Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Third Party Defendants-Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered March 15, 1972, and that

Court's denial of a petition for re-hearing, entered April 11, 1972, insofar as they affirm the judgment of the District Court for the District of Puerto Rico, entered April 29, 1971 and its denial of petitioners' motion for a new trial, entered June 17, 1971.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 456 F. 2d 970 (1 Cir., 1972). The pertinent opinion of the District Court is not officially reported. Both opinions are reprinted in the appendix hereto.*

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1) and Rule 19.1 (b) of the Rules of the Supreme Court.

QUESTIONS PRESENTED

In a suit by a longshoreman under the General Maritime Law for injuries sustained aboard a vessel, is not the vessel owner entitled, under the Seventh Amendment, to a jury determination of the issue of contributory negligence where there is evidence that the longshoreman knowingly exposed himself to dangerous conditions?

Was not the imposition of additional punitive liabilities, pursuant to local law, a violation of the required uniformity under Federal Maritime Law?

STATUTES INVOLVED

The only statutes involved are Puerto Rican Rules of Civil Procedure 44.4 (d) and 44.4 (e).

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*References to the appendix herein are by the letter "A".

STATEMENT OF THE CASE

Respondents, longshoremen employed by International Shipping Agency, Inc., brought diversity suits in the District Court for the District of Puerto Rico to recover damages for injuries sustained as a result of being overcome by carbon monoxide fumes while working aboard the m/v Brasilia, a dry cargo vessel owned by petitioner.

On August 23, 1966, the m/v Brasilia was berthed at Pier 6, San Juan Harbor, Puerto Rico. That morning, among other stevedoring activities, longshoremen in the employ of International Shipping Agency, Inc. shifted cargo from hatch No. 4 to the 'tween deck of hatch No. 5, where it was restowed in a reefer compartment (A-21, A-22).

To facilitate this shifting operation, a gasoline operated forklift was supplied by International, at the request of a ship's officer, for use within the reefer compartment. This machine began to foul the atmosphere of the reefer compartment by the emission of exhaust smoke from the time it started to operate within those confines (A-22, A-23, A-24), and the toxic effects were felt almost immediately by the longshoremen-respondents working there (A-23, A-24). Because of nausea and dizziness induced by these conditions, they complained to their hatch foreman, who secured the assurance of the vessel's First Officer that the ship's ventilation system would be turned on. Within approximately one hour thereafter, respondents, four holdmen and the forklift operator, were overcome by carbon monoxide. (See Opinion of the Court of Appeals, 456 F. 2d at 973).

At the close of all the evidence, the Trial Judge directed a verdict in favor of plaintiffs and refused defendants' request to submit to the jury the issue of plaintiffs' contributory negligence in mitigation of damages on the ground that no evidence had been adduced to support a finding thereof. Defendants' motion for a new trial was

denied and judgments were directed to be entered totalling $182,600. In addition, the Trial Judge awarded interest from the day the complaints were filed and assessed a penalty of $12,000 against defendants for alleged obstinacy—these last two purportedly authorized by §§ 44.4 (e) and 44.4 (d) of the Puerto Rican Rules of Civil Procedure.

In reviewing the lower court's rulings on the issue of contributory negligence, the Court of Appeals for the First Circuit acknowledged its obligation to view the evidence in a light most favorable to the vessel owner. It then summarized such evidence, as follows:

> "Viewed in such a light, the evidence established that the plaintiffs, feeling dizzy and nauseous, complained to the foreman and were subsequently informed that the fans would be turned on. They were ordered to keep working in the hold, and work continued until several of them were overcome by carbon monoxide."*

To this brief outline, petitioners would respectfully add that there was evidence tending to show that the forklift emitted smoke into the confined atmosphere from the time it began operating (A-22, A-23, A-24); that the respondents working therein began to feel the ill effects almost immediately (A-23, A-24); that if fans were turned on, the beneficial effect was negligible (A-24, A-25);** that other holdmen left the area to get fresh air (A-22); that the longshoremen considered themselves free to leave their place of work

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*The Court of Apeals assumed the prerogative of evaluating and rejecting the testimony of one plaintiff that no complaints were made. 456 F. 2d at 873, footnote 3.

**This factor was considered irrelevant by the Court of Appeals as well as the issue of whether work was temporarily suspended, 456 F. 2d at 974, despite the importance seemingly attached to them by the trial court (A-6).

in the face of dangerous conditions, orders to the contrary notwithstanding (A-23, A-25).

Following its factual summary, the Court of Appeals correctly stated petitioners' position, as follows:

> "The defendant's theory is that the plaintiffs' continued presence in the hold was contributory negligent, as they knowingly exposed themselves to dangerous conditions."

In rejecting the shipowner's contention, the Court of Appeals noted that the longshoremen had complained of the dangerous condition, were not in control of stevedoring operations and that, under the circumstances, assumption of risk would not be allowed to masquerade as contributory negligence. The District Court's refusal to submit the issue of contributory negligence to the jury was affirmed.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully submit that the decision of the Court of Appeals (a) conflicts with applicable decisions of this Court, (b) creates a conflict with the decisions of other Courts of Appeals in the field of Maritime Law, (c) deprived petitioners of the right to trial by jury guaranteed by the Seventh Amendment to the United States Constitution and (d) subjected them to punitive liabilities pursuant to local law, not recognized under the General Maritime Law.

(a) Conflict with applicable decisions of this Court

The precise point at issue was long ago passed upon in *District of Columbia* v. *McElligott*, 117 U. S. 621 (1886), where the Court felt compelled to correct a misapplication of its prior decision in *Hough* v. *Railway Co.*, 100 U. S.

213 (1879). Speaking for the Court, Justice Harlan stated, 117 U. S. at 633:

> "On the contrary, if liability might come upon the District (defendant) for the negligence of its officers controlling his (plaintiff's) services, he was under an obligation to exercise due care in protecting himself from personal harm while discharging duties out of which such liability might arise. If he failed to exercise such care; if he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment, he would, notwithstanding any promises or assurances of the District supervisor of the character alleged (that remedial action would be forthcoming), be guilty of such contributory negligence as would defeat his claim for injuries so received." [Parenthetical material added].

This principle was consistently re-affirmed, *Kane* v. *Northern Central Railway Co.*, 128 U. S. 91, 94 (1888); *Delaware and c. Railroad* v. *Converse*, 139 U. S. 469 (1891); *Davidson Steamship Co.* v. *United States*, 205 U. S. 189 (1907), and the necessity of submitting the issue to the jury was underscored in *Richmond & Danville Railroad* v. *Powers*, 149 U. S. 43 (1893) where it was stated at p. 45:

> "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

See also: *Dunlop* v. *Northeastern Railroad Co.*, 130 U. S. 649, 652 (1889).

Apparently, the error of the Court of Appeals below, in labeling petitioners' theory one of "assumption of risk", arose out of a confusion in the application of terms—a confusion which first achieved significance with the introduction of the doctrine of comparative negligence in cases involving injured railroad workers at a time when assumption of risk was still considered a complete defense. Thus, the Court was moved to note in *Seaboard Air Line* v. *Horton*, 239 U. S. 595 (1916), at 601:

> "While most courts agree that an employe cannot, without impairing his right to recover from the employer, remain at work in the presence of a known danger so imminent that no reasonably prudent man would confront it, even where the employer has promised reparation, they differ as to whether this is to be placed upon the ground of assumption of risk or of contributory negligence. See, *Hough* v. *Railway Co.*, 100 U. S. 213, 224, 225; *Dowd* v. *Erie R. R.*, 70 N. J. L. 451, 456; *Clarke* v. *Holmes*, 7 Hurl. & Norm. 937, 945. The distinction, which was of little consequence when assumption of risk and contributory negligence led to the same result, becomes important in actions founded upon the Federal Employers' Liability Act, which in ordinary cases recognizes assumption of risk as a complete bar to the action while contributory negligence merely mitigates the damages, as was pointed out when the case was here before."

Most important for present purposes, however, was the earlier statement in the Court's opinion, 239 U. S. at 600:

> "The employer's direction or request that the employe remain at work pending performance of the promise has a material bearing upon the employe's

> duty in the meantime, and therefore upon the question of his negligence, which involves the notion of some fault or breach of duty on his part. *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 503. Hence, the question of Horton's contributory negligence was at best a matter for the jury to determine."

The confusion became even more acute when, in 1939, Congress abolished the defense of assumption of risk in all such cases. As a result, the problem was again reviewed in *Tiller* v. *Atlantic Coast Line,* 318 U. S. 54 (1943), when the lower courts had attempted to revive the defense in a case where plaintiff's decedent was killed while working under perilous conditions. In reversing, this Court concluded that assumption of risk would not be permitted to survive under any guise. However, in so doing, it stated significantly at p. 68:

> "We think that the question of negligence on the part of the railroad and on the part of the employee should have been submitted to the jury."

Historically, then, there evolved the concepts (1) that where comparative negligence applied, an injured plaintiff's failure to leave an area of known danger could be considered in mitigation of damages but would not be a complete defense to his claim and (2) that his conduct in this regard was an issue of fact to be determined by the jury.

The same equitable result has found acceptance in injury suits by maritime workers, *Beadle* v. *Spencer,* 298 U. S. 124 (1936); *Socony-Vacuum Co.* v. *Smith,* 305 U. S. 424 (1939).*

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*While recognizing a conceptual difference between assumption of risk and contributory negligence, the text writers agree that that there are areas where the two overlap—as where plaintiff's conduct would justify a charge as to either or both. See Prosser on Torts, 3rd Edition, 1964, at p. 434; Harper and James, The Law of Torts (1956), Vol. II, § 21.1 at p. 1162 and § 22.2 at p. 1201.

(b) Conflict among the Circuits

Prior to the decision below, the various circuits had been in agreement in the application of the principles set forth in (a) *supra,* and in espousing petitioner's position, in the field of maritime law.

In *Misurella* v. *Isthmian Lines, Inc.,* 215 F. Supp. 857, aff'd, 328 F. 2d 40 (2 Cir., 1946), the District Court, dealing with a factual situation identical to the one considered here, stated at p. 860:

> "The question remains whether the defendant has sustained the defense of contributory negligence on the part of plaintiff so that the damages are subject to diminution. The plaintiff became ill as the work progressed. He became nauseous, experienced a terrific headache, and had difficulty in breathing after working about an hour and a half. As he continued to work, the hold was smoke filled from the exhaust of the hi-lo. He knew of the need for ventilation, for, as already found, he called up several times requesting that the ventilation system be put in operation. Yet he persisted in carrying on until about 11:15, this notwithstanding that he observed fellow employees to go up for fresh aid at one time or another. It may seem rather odd to hold him liable because he persisted in sticking to his job, but under all the circumstances it was reasonable to require him to forego his task and follow the example of his co-workers. The Court finds that the amount of damages should be reduced to the extent of fifty percent by reason of plaintiff's contributory negligence."

The Second Circuit has expressly stated that it is the "better practice" in such cases to permit the issue of contributory

negligence to go to the jury, *Albanese* v. *N. Nedrl. Amerik, Stoomv. Maats.*, 346 F. 2d 481 (2 Cir., 1965), reversed on other grounds, 382 U. S. 283 (1965).

In the Ninth Circuit, the rule was stated in *DuBose* v. *Matson Navigation Co.*, 403 F. 2d 875 (9 Cir., 1968) at p. 879:

> "When a maritime worker continues to work under conditions known to be dangerous, he may be found to be contributorily negligent."

In the Third Circuit, it received approval in *Mroz* v. *Dravo Corporation*, 429 F. 2d 1156 (3 Cir., 1970) at p. 1163:

> "If a person by his own action subjects himself unnecessarily to danger which should have been anticipated and is injured thereby he is guilty of contributory negligence."

In fact, until its decision in this case, the First Circuit was in complete accord, for as was earlier stated in *B. A. Carroll Stevedore Co.* v. *Makinda*, 20 F. 2d 19 (1 Cir., 1927), in holding that the District Court had erred in refusing to charge contributory negligence, at p. 22:

> "The fact that he (plaintiff) went to work in a place of danger in obedience to orders of his superior officer would not, of itself and as a matter of law, relieve him from his fault in being there. His presence there in obedience to orders was simply one of the facts or circumstances to be considered by the jury in determining the plaintiff's care and the defendant's fault, the latter being aware of his presence in a place of danger."*

*This case was summarily overruled by footnote 7 of the opinion below, 456 F. 2d at 974.

Without characterizing those features of the case which the court below relied on as determinative of the issue raised, petitioners believe that they were but factors to be weighed by the jury along with all others in evaluating respondents' conduct.

(c) Denial of Trial by Jury

In *Jacob* v. *New York,* 315 U. S. (1942), the Court remanded a case for a new trial and began its opinion as follows:

> "The right of jury trial in all civil cases at common law is a basic and fundaamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

More recently, in *A. & G. Stevedores* v. *Ellerman Line,* 369 U. S. 355 (1962) it was said at 360:

> "As we recently stated in another diversity case, it is the Seventh Amendment that fashions the federal policy favoring jury decisions of disputed fact questions."

Given this right to trial by jury where "fairminded men will honestly draw different conclusions", *Richmond & Danville Railroad* v. *Powers, supra,* can it reasonably be said that such fairminded men could not have found these respondents guilty of contributory negligence in some degree, while a finding of 50% contributory negligence was previously approved in an identical fact situation, *Misurella* v. *Isthmian Lines, Inc., supra?* Was the court below justified in stating, as a matter of law, that the danger in-

volved was not sufficiently apparent in an era when all are conscious of the harmful effects of motor vehicle exhaust? If so, why did respondents complain?

(d) Awards of Counsel Fees and Pre-Judgment Interest under local law

Petitioners respectfully submit that the penalty award of attorneys fees under Puerto Rican Rules of Civil Procedure 44.4(d) was wholly unwarranted. That section provides for such an award where a party has been found guilty of obstinacy (see footnote 10 of Court of Appeals Opinion). Under the circumstances of this case, such obstinacy cannot be demonstrated by the Court of Appeals statement that "defendant was unable even to reach the jury on contributory negligence", 456 F. 2d at 975, where such inability was, manifestly, the result of a denial of petitioners' constitutional right under the Seventh Amendment.

In addition to being contrary to the general policy pursued in our federal courts—see *Fleischmann Corp.* v. *Mair Brewing,* 386 U. S. 714 (1967)—the penalty provided is of purely local origin and "[t]he federal court, of course, recognizes the Puerto Rican rule, enacted by statute, as a matter of substantive right." *Pan American World Airways, Inc.* v. *Ramos,* 357 F. 2d 341 (1 Cir., 1966) at 342. Since the federal maritime law provides a separate and distinct body of substantive rights, the grafting on thereto of an additional local right by the courts below was error, absent some authorization by Congress or this Court, *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233. Petitioners, then, solicit the authority of this Court to: ". . . give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.' " *Moragne* v. *States Marine Lines,* 398 U. S. 375 (1970) at 402.

The award of interest from the date the respective complaints were filed was, too, without justification. As noted by the Court of Appeals, Puerto Rican Rules of Civil Procedure 44.4(e) was inapplicable. In addition, the general verdicts returned in this case preclude any mathematical computation of the amount awarded for damages sustained prior to judgment. This defect was noted in the very authority relied on below, *Petition of City of New York,* 332 F. 2d 1006 (2 Cir., 1964) cert. denied, 379 U. S. 922, where the Court of Appeals stated at 1008:

> "In addition the report of the Commissioner does not reveal whether any of the damages allowed here represent compensation for future loss of earnings or future pain and suffering. To the extent that there are elements of future losses which are represented in the final damages prejudgment interest is, of course, not appropriate."

Where, as here, a new trial is in order, petitioners respectfully submit that it be of all the issues for the reasons set forth in *Cosentino* v. *Royal Netherlands Steamship Co.,* 389 F. 2d 726 (2 Cir., 1968), cert. denied 393 U. S. 977.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari herein be granted.

July 6, 1972.

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United States District Court

FOR THE DISTRICT OF PUERTO RICO

JOSE VIRELLA RIVERA, PABLO CANTRES AND ANTONIO PALU BENITEZ, *Plaintiffs,* v. REDERI A/B NORDSTJERNAN and AXEL AXELSON JOHNSON, *Defendants and Third Party Plaintiffs,* v. INTERNATIONAL SHIPPING AGENCY, INC. and COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, *Third Party Defendants.*	Civil No. 236-68 (filed & entered June 17, 1971)
JOSE VALDIVIA, *Plaintiff,* v. REDERI A/B NORDSTJERNAN and AXEL AXELSON JOHNSON, *Defendants and Third Party Plaintiffs,* v. INTERNATIONAL SHIPPING AGENCY, INC. and COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, *Third Party Defendants.*	Civil No. 448-68

Opinion and Order

The several post trial motions filed by the respective parties in this three sided litigation are now, after arguments and memoranda, ready for disposition. Reversing

the order, the motions of the third party defendant will be discussed first, then the motions of the defendant, and, finally, the plaintiffs' motions. For the sake of brevity and comprehension, the third party defendant will hereinafter be referred to as the stevedoring contractor; the defendant will be referred to as the shipowner; and, the plaintiffs, when alluded to collectively, as the longshoremen.

I THIRD PARTY DEFENDANT'S OBJECTIONS TO THE BILL OF COSTS SUBMITTED BY PLAINTIFFS.

The stevedoring contractor has objected to three separate items included in the Bill of Costs submitted by the longshoremen; the fees of the translator, costs incurred in the service of subpoenaes and the witness' fees of the experts in excess of the fee schedule contained in the statute. No authority was cited by the stevedoring contractor.

Putting aside the technical objection of timeliness,[1] the motion is without merit. Translator's fees for documents necessarily obtained for use at trial are allowable. RAFFOLD PROCESS CORP. v. CASTANEA PAPER CO., 1938, 25 F. Supp. 593; GOTZ v. UNIVERSAL PRODUCTS CO., INC., 1943 3 F. R. D. 153; BENNET CHEMICAL CO. v. ATLANTIC COMMODITIES, LIMITED, 1959, 24 F. R. D. 200. Each of the translations was a document admitted into evidence that could not be given to the jury at the time of deliberation because of the Rules of This Court.

Had the United States Marshal served the subpoena, there would be no question of the taxability of his fees. Faced as we are with an extremely overworked Marshal's

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[1]The Bill of Costs was verified, served and filed on April 27, 1971, and provided for notice of three days. The opposition to the Bill of Costs was not signed until May 10, 1971.

office, it is inconceivable that a party, especially one who has the burden of proof, would rely on the Marshal to serve subpoenaes. Since there is no quarrel over the amount of the fees, this item is also an allowable item of costs.

In HENLOPEN HOTEL CORPORATION v. AETNA INSURANCE COMPANY, 1965, 38 F. R. D. 155, it was held,"... [f]or the same reasons as given above, I believe a Federal Court, in a diversity case, should, where proper, enforce an expressed state policy of taxing expert witnesses' fees as part of the costs." As expressed by the Supreme Court of Puerto Rico, in GARRIGA, JR. v. SUPERIOR COURT, 1963, 88 P. R. R. 237, the policy in respect to costs is enunciated. That policy is to liberally exercise discretion in favor of allowance of all items that are a) necessary, b) incurred, and c) reasonable. No one can gainsay the necessity of producing expert medical witnesses in a suit for money damages for personal injuries. The plaintiffs' counsel has verified, under oath, that these expenses were actually incurred. The Court is aware of the fact that standard fees for expert medical witnesses in Puerto Rico range from $200. per half day to $500. for an appearance if the witness must lose the entire day from his practice. Considering the number of appearances, the Court concludes that these costs were reasonable.

The objections to the Bill of Costs are overruled.

II THIRD PARTY DEFENDANT'S MOTION FOR A NEW TRIAL, BASED ON ALLEGED ERRORS IN INSTRUCTIONS AND ADMISSION OF EVIDENCE.

This portion of the stevedoring contractor's motion for a new trial is directed against the judgment against it, obtained by the shipowner. The first objection is in failing to give an instruction that, in effect, would have directed a ver-

dict in favor of the stevedoring contractor, on the ground that since it was realizing no profit for the shifting operation which was being performed at the time the longshoremen were injured, that it had no control, hence no responsibility. Warranties do not depend on profit. A manufacturer who loses money on its product is under no lesser duty with respect to the quality of the product than is the successful manufacturer. A stevedoring contractor cannot avoid his duty to perform his services in a workmanlike manner because a portion of its services were billed at cost, rather than cost plus profit.

The second requested instruction also was fatally defective because it directed findings as to specific issues of fact that lay exclusively within the province of the jury. The third and lengthy instruction, which the Court denied, and the stevedoring contractor contends was erroneous, was based upon the principal that when a shipowner is made aware of a dangerous condition and orders the stevedoring contractor to continue working, the latter may be released of his duty to faithfully perform his services. See TORRES CRUZ v. HUDSON STEAMSHIP CO., 1 Cir. 1963, 314 F. 2d 44. The facts in the case at bar did not justify such an instruction. The shipowner did not order the stevedoring contractor to continue working until it had taken corrective action by activating the blowers.

The stevedoring contractor also contends that by admitting the log book into evidence, the Court committed prejudicial error. The foundation for the admission of the log book was properly laid and a cautionary instruction as to the weight of such evidence was given at the time of admission and prior to the jury's deliberation.

This portion of the stevedoring contractor's motion for a New Trial is denied.

III MOTIONS OF DEFENDANT AND THIRD PARTY DEFENDANT FOR A NEW TRIAL BASED ON THE ALLEGED ERROR IN DIRECTING A VERDICT IN FAVOR OF PLAINTIFFS.

Neither the shipowner nor the stevedoring contractor adopt the position that the vessel was not unseaworthy.

However, they argue that by directing a verdict, the Court precluded them from arguing to the jury about the issue of comparative negligence. The defendant also contends that the longshoremen were negligent because they worked under the orders of an incompetent hatch foreman. They have also reworded this latter argument by alleging that the negligence of the hatch foreman is imputable to the longshoremen. Either phraseology is merely an attempt to revitalized the dead corpse of "assumption of risk" which is not cognizable in maritime torts.[2]

Had there been a scintilla of evidence of comparative negligence, even from the proof offered by plaintiffs, the Court would have permitted the issue to go to the jury. It is not negligence for a longshoremen to perform work as instructed, or to fail to protest against the method of operation, or not to devise a safer method.[3] It is true that a finding of comparative negligence was made in MISURELLA v. ISTHMIAN LINES, INC. S. D. N. Y. 1963, 215 F. Supp. 857, affirmed 2 Cir. 1964, 328 F. 2d 40, but the facts in that case

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[2]*Klimaszewski* v. *Pacific-Atlantic Steamship Co.*, 3 Cir. 1957, 246 F. 2d 875; *Palermo* v. *Luckenbach Steamship Co., Inc.*, 1957, 355 U. S. 20, 78 S. Ct. 1, 2 L. Ed. 2d 3, modified, 355 U. S. 910, 78 S. Ct. 337, 2 L. Ed. 2nd 271.

[3]*Ballwanz* v. *Isthmian Lines, Inc.*, 4 Cir. 1963, 319 F. 2d 457, 462; *Darlington* v. *National Bulk Carriers, Inc.*, 2 Cir. 1946, 157 F. 2d 817, *Becker* v. *Waterman S. S. Corporation*, 2 Cir. 1950, 179 F. 2d 713.

are inapposite to the evidence in the instant case. Misurella deliberately continued working after his fellow workers had left the area and after he had become seriously ill. Here the longshoremen stopped working until the blowers were working, and then they worked without symptoms of illness until they were all suddenly overcome. CF. ALBANESE v. N. V. NEDERL. AMERIK STOOMY MAATS, 2 Cir. 1965, 346 F. 2d 481. It would have been misleading and prejudicial, under all of the evidence, to permit an argument regarding comparative negligence.

The Motions for a New Trial on this ground are denied.

IV MOTIONS FOR A NEW TRIAL BASED ON EXCESSIVENESS OF THE VERDICT.

Verdicts are excessive when they are "monstrous", "shocking" or where there is a "plain injustice". The verdicts herein are neither monstrous nor shocking. Nor is there any suggestion that they were the result of inducements to passion or prejudice. Surprisingly, the Court has no problem in the larger verdicts of $76,350.00 and $73,250.00 awarded to Mr. Cantres and to Mr. Valdivia. They are not unjust and are within the maximum permissible limits.

But a motion for a new trial on the ground of excessiveness is addressed to the sound discretion of the court and this Court is of the opinion that the verdicts in favor of Mr. Virella and Mr. Falú of $23,500.00 and $21,500.00 are so high as to be unreasonable. Admittedly, the stevedoring contractor argued before the jury that awards of $12,500.00 and $10,000.00, respectively, would be reasonable, and it is difficult to draw a line. Nevertheless, con-

sidering the absence of permanent injury in the case of Mr. Falú, and the absence of positive neurological signs in the case of Mr. Virella, the three to four months of loss of earnings, in both cases, the Court is of the opinion that a judgment in favor of Mr. Falú in excess of $18,000.00, and a judgment in favor of Mr. Virella in excess of $15,000.00, would constitute a plain injustice.

It is the judgment of the Court that unless said plaintiffs remit the amounts in exces of said sums, in writing, within thirty (30) days from the date of entry hereof, a New Trial be ordered in their cases only, confined to the issue of damages.

V PLAINTIFFS' MOTIONS FOR ATTORNEYS' FEES AND PRE-JUDGMENT INTEREST.

After the return of the jury verdict, plaintiffs' counsel moved for an award of attorneys' fees, and for pre-judgment interest.[4] In a diversity action such an award is governed by state law, even if the claim is based upon a maritime tort.[5]

The Court finds the defendant shipower guilty of obstinacy. FIREMAN'S FUND INSURANCE COMPANY v. SANTORRO, 1 Cir. 1967, 376 F. 2d 157, 160; SOTO v. LUGO, 1954, 76 P. R. R. 416, 419. Despite the hotly contested issue of indemnity, the defendant could have settled with the plaintiffs and pursued its rights against the third party without causing the plaintiffs to unnecessarily litigate. The ship-

[4]Following the practice established in *Pan-American World Airways* v. *Ramos*, 1 Cir. 1966, 357 F. 2d 341, 342.

[5]*Petition of Midwest Towing Company, Inc.*, E. D. Ill. 1962, 203 F. Supp. 727; *Petition of The City of New York*, 2 Cir. 1964, 332 F. 2d 1006, 1008, cert. denied, 379 U. S. 922, 85 S. Ct. 277, 13 L. Ed. 2d. 335.

owner could have tendered the defense to the stevedoring contractor in exchange for a hold harmless agreement. If the tender were refused it could have procured Court approval of the settlement.[6] Even in the absence of tender, Court approval of a settlement may be obtained. See TANKREDERIET GEFION A/S v. HYMAN-MICHAELS COMPANY, 6 Cir. 1969, 406 F. 2d 1039, and cases cited therein. Defendant's counsel were familiar with this procedure and have used it in this Court, VELEZ NEGRON v. SEA LAND SERVICE, Civil No. 841-67; VAZQUEZ CABALLERY v. WATERMAN S. S. CORP., Civil No. 202-68.

Once a finding of obstinacy is made, the award of attorneys' fees is mandatory.[7] The amount of the award must take into account the work necessarily done by the successful party, the nature of the litigation, the questions involved, the duration of the trial, the amount in controversy and the professional standing of the attorneys for both parties. HEIRS OF TRIAS v. PORTO RICO LEAF TOBACCO Co., 1941, 59 P. R. R. 228-229. The award must be proportionate to the effort and professional activity displayed by the attorney for the successful party. SERRANO v. LUGO, 1961, 83 P. R. R. 290, 292.

Considering all these factors, the Court awards the plaintiffs attorneys' fees in the total sum of $12,000.00, to be divided among them in the same proportion as each judgment bears to the total judgment.[8] These attorneys'

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[6] *N. M. Patterson & Sons, Limited* v. *Nicholson Cleveland Terminal Co.*, N. D. Ohio 1971, 323 F. Supp. 913.

[7] *Zalduondo* v. *Mendez*, 1953, 74 P. R. R. 416, 419.

[8] In reaching the amount of attorneys' fees, the Court has taken in consideration, as one of the factors to be considered, the amount of the award as if the difference suggested by the Court had already been remitted. The Court may or may not reconsider this amount, depending on the outcome of the case once it becomes final. The Court has also considered that the work performed by the attorneys for the plaintiffs in relation with the Colón- Núñez issue was for the benefit of a great number of plaintiffs not herein involved.

fees occasioned by the defendant's conduct cannot be recovered over against the third party defendant.

By statute, it is likewise imperative to award pre-judgment interest upon a finding of obstinacy. Rule 44.44 (e) of the Rules of Civil Procedure of the Commonwealth of Puerto Rico. Since both complaints were filed after the effective date of the stautes, interest shall be computed on the judgments in the case of José A. Valdivia from July 12, 1968 and in the other cases from April 5, 1968 at the rate of 6% per annum until paid. No interest shall be computed for the time these actions were stayed pending the decision of COLON-NUÑEZ v. HORN LINIE, 1 Cir., 1970, 423 F. 2d 952. (November 26, 1968 to March 27, 1970). The pre-judgment interest may not be included in the indemnity award against the stevedoring contractor.

The foregoing constitutes the rulings and order of this Court. An appropriate Amended Judgment will be entered.

GIVEN in San Juan, Puerto Rico, this 17th day of June, 1971.

HIRAM R. CANCIO
Hiram R. Cancio
Chief, United States District Judge.

Opinion of Court of Appeals

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 71-1258

JOSE VIRELLA RIVERA, ET AL.,

PLAINTIFFS, APPELLEES,

V.

REDERI A/B NORDSTJERNAN, ET AL.,

DEFENDANTS, AND THIRD PARTY PLAINTIFFS, APPELLANTS,

v.

INTERNATIONAL SHIPPING AGENCY, INC., ET AL.,

THIRD PARTY DEFENDANTS, APPELLEES

No. 71-1259

JOSE VIRELLA RIVERA, ET AL.,

PLAINTIFFS, APPELLEES,

V.

REDERI A/B NORDSTJERNAN, ET AL.,

DEFENDANTS, AND THIRD PARTY PLAINTIFFS, APPELLANTS,

v.

INTERNATIONAL SHIPPING AGENCY, INC., ET AL.,

THIRD PARTY DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges.*

Vicente M. Yodrach with whom *Hartzell, Fernandez, Novas & Yodrach* and *Haight, Gardner, Poor & Havens* were on brief, for Rederi A/B Nordstjernan et al.

Jaime Pieras, Jr., with whom *Pieras & Torrulla* was on brief, for International Shipping Agency, Inc., et al.

Harvey B. Nachman, with whom *Nachman, Feldstein & Gelpi* was on brief, for Jose Virella Rivera, et al.

March 15, 1972

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Opinion of Court of Appeals

McENTEE, *Circuit Judge.* The four plaintiffs, longshoremen in the port of San Juan, brought damage actions against the owner and operator of the vessel M/V Brasilia for injuries resulting from carbon monoxide poisoning. These federal diversity suits alleged negligence and unseaworthiness as grounds for relief. The defendant, as third party plaintiff, impleaded the International Shipping Agency, Inc. and its insurer, seeking indemnity on the grounds of negligence and unworkmanlike performance.[1] The third party defendant is an independent stevedoring contractor and was the plaintiffs' employer at the time of the accident. At trial, after all the evidence was heard, the court directed a verdict for the plaintiffs, holding that the vessel was unseaworthy as a matter of law and that there was no evidence of contributory negligence. The jury assessed damages and in the third party indemnity action held for the ship. Both the defendant and the third party defendant appeal.[2]

Shortly after 8 a.m. on August 23, 1966, a crew of longshoremen in the employ of the stevedore commenced the assigned task of receiving cargo in the 'tween deck of hold #5. The cargo, being shifted from another hold on the Brasilia, was to be stowed in a refrigerator compartment. The stowing crew, under the supervision of one of the stevedore's foremen, initially tried to move the 350-400 pound cardboard containers manually. At the suggestion of one of the ship's officers a forklift was brought on board

[1]Both the defendants and third party defendants, for the sake of convenience and clarity, will be referred to in the singular as the ship and the stevedore respectively.

[2]Although the defendant was not held ultimately liable, the plaintiffs' attorneys' fees were assessed against it. Also, during trial the defendant and the third party defendant stipulated to equally apportion any adverse jury verdict plus assessed costs.

DO CLOSE IN CENTER

and placed in the hold. Three of the plaintiffs, Pablo Cantres Roman, Jose Virella Rivera, and Antonio Falu Benitez were among the holdmen in the crew. Plaintiff Jose A. Valdivia drove the gasoline-powered forklift, which was the only type the stevedore owned. The evidence on specific times is not precise nor uncontradicted, but it appears that the forklift began operating in the compartment between 9 and 9:30 a.m.

When the machine started its operations the compartment's ventilation system was not in operation. Control over the ventilation blowers rested exculsively with the ship's officers. After approximately one hour, the compartment became hot and the men in the hold complained to the foreman of nausea and dizziness. Acting on these complaints, the foreman went "upstairs" and informed the ship's first officer of the situation and requested that the fans be turned on. The officer replied that he would switch on the ventilation system and that the men should continue working. The foreman returned to the hold, told the crew that ventilation was forthcoming, and ordered a resumption of work. Shortly thereafter some indication of increased ventilation was noticed.

The men resumed work, and although the forklift continued to emit smoke there is evidence that the fumes were less noticeable in the cooler air. However, within approximately one hour, several of the plaintiffs were overcome by carbon monoxide. Valdivia collapsed and Falu Benitez lost consciousness. The foreman pulled several persons from the compartment and ordered the rest to stop work and quit the hold. Subsequent medical diagnoses revealed that each of the plaintiffs suffered some degree of carbon monoxide asphyxiation.

The court found the vessel unseaworthy as a matter of law, a finding which met no objection. A major contention on appeal, however, is that the court erred in refusing to submit the issue of plaintiffs' contributory negligence to the jury. It is settled beyond dispute that a vessel owes an obligation of seaworthiness to longshoremen injured aboard ship, *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946), that the contributory negligence of such person does *not* bar his action but only mitigates damages, *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406 (1953), and that the doctrine of assumption of risk is incongruous and inapplicable to such maritime claims, *Socony-Vacuum Co.* v. *Smith,* 305 U. S. 424 (1939).

The district court kept the issue from the jury on the ground that no evidence had been adduced to support a finding of contributory negligence. In reviewing this ruling we must view the evidence in a light most favorable to the objecting parties. Viewed in such a light, the evidence establishes that the plaintiffs, feeling dizzy and nauseous, complained to the foreman[3] and were subsequently informed that the fans would be turned on. They were ordered to keep working in the hold, and work continued until several of them were overcome by carbon monoxide.[4] The defend-

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[3]Of the six witnesses who were in the hold, five testified unequivocally that complaints were made to the foreman, and it is undisputed that the foreman asked the ship's officer to turn on the blowers. The defendant relies on the testimony of the sixth witness, plaintiff Virella Rivera, that no complaints were made, in arguing that a question of fact was created. Although the credibility of a witness and the weighing of contradictory evidence is generally for the jury, in the context of this record we cannot say that this statement, made by one obviously confused about the events and admittedly suffering from memory loss, amounted to more than a mere scintilla of evidence.

[4]Whether work was suspended after the complaints and whether the blowers were in fact turned on are not relevant, on the facts of this case, to the question of contributory negligence.

ant's theory is that the plaintiffs' continued presence in the hold was contributorily negligent, as they knowingly exposed themselves to dangerous conditions. Defendant relies, *inter alia,* on *Mroz* v. *Dravo Corp.,* 429 F. 2d 1156 (3d Cir. 1970) and *Du Bose* v. *Matson Navigation Co.,* 403 F. 2d 875 (9th Cir. 1968). An analysis of these cases, however, demonstrates why defendant's theory does not hold water. In *Mroz* the plaintiff, a ship's cook, was exposed for three years to noxious fumes which had previously made her ill. These facts raised a jury question of contributory negligence because she knew the conditions were dangerous and "she did not complain of those conditions or ask to be transferred to other work."[5] Similarly, in *DuBose* a seaman's leg was exposed to a continual bumping action, and plaintiff was "negligent in not setting in motion circumstances which would bring about a change of conditions, namely, informing his superiors of the bumps he had been receiving so that they could change the course of the dish-runners."[6] In the instant case, however, the plaintiffs *did* complain of the condition, were told the problem would be remedied, and were ordered to continue working. They were not in control of the stowing operations in the hold and cannot be held responsible for the overall manner of stowing. *Ballwanz* v. *Isthmian Lines,* 319 F. 2d 457 (4th Cir. 1963), *cert. denied,* 376 U. S. 970 (1964). To say the plaintiffs were contributorily negligent in these circumstances would be to state that in continuing work they assumed the risk of obeying orders. We will not allow assumption of risk to masquerade as contributory negligence.[7]

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[5]429 F. 2d at 1164.

[6]403 F. 2d 878.

[7]To the extent that *B. A. Carroll Stevedore Co.* v. *Makinda,* 20 F. 2d 19 (1st Cir. 1927) is at odds with this conclusion, it is no longer good law.

Although a seaman or longshoreman does not assume the risk of obeying an order, it is sometimes said that unwarranted obedience to an absurd or obviously dangerous order may be negligence. *See Klimaszewski* v. *Pacific-Atlantic S. S. Co.*, 246 F. 2d 875 (3rd Cir. 1957); *Darlington* v. *National Bulk Carriers*, 157 F. 2d 817 (2d Cir. 1946). The fumes were clearly annoying to the plaintiffs, but the record is barren of any evidence that they knew, for example by prior experience, that the order to continue working posed obvious dangers. *Cf. Mroz* v. *Dravo Corp., supra; Haddock* v. *North Atlantic & Gulf S. S. Co.*, 81 F. Supp. 421 (D. Md. 1948). Carbon monoxide is colorless and odorless, even if the smoke was not, and the plaintiffs had a right to believe the compartment was being properly ventilated. The danger of the situation cannot be said to have been obvious.

In examining the contention that the damages awarded were excessive, we must view the evidence most favorably to the injured plaintiffs, for we are most reluctant to overturn a jury verdict, especially where the sums include unspecified compensation for pain and suffering.[8] We will disturb a jury award only where the sum is "so excessive that the district court's refusal to order a new trial constitutes a manifest abuse of discretion." *Ganapolsky* v. *Park Gardens Development Co.*, 439 F. 2d 844, 846 (1st Cir. 1971). Cantres Roman ($76,350) incurred permanent brain damage and has experienced several epileptic seizures as a result of the accident. Valdivia ($73,250) suffered permanent brain damage, which has impaired his vision and memory. He

[8]However, although pain and suffering are difficult to quantify, their presence does not immunize a jury verdict. *See Compania Transatlantic Espanola, S. A.* v. *Melendez Torres*, 358 F. 2d 209 (1st Cir. 1966).

has also developed a severe psychological reaction. Virella Rivera ($18,000, reduced with consent from $23,000) has continual headaches and permanent visual impairment, but did return to work four months after the accident. None of these awards is so unreasonable as to require a redetermination of damages. The same, however, cannot be said of the award to Falu Benitez ($15,000, reduced with consent from $21,500). Falu Benitez was unconscious for two hours after the accident, and for a period of one to two months thereafter suffered from intermittent headaches, for which he was given pills. After his discharge from outpatient treatment, approximately six weeks after the accident,[9] he returned to work and has felt well ever since. His precise earnings loss does not appear on the record, but likely did not exceed five percent of the judgment. On the basis of these facts, the $15,000 award was *far in excess* of reasonable compensation for pecuniary losses and a brief period of rather minor pain and suffering, and the amount must be redetermined in a new trial limited to this issue.

The defendant objects to the imposition of attorney's fees pursuant to Puerto Rican Rules of Civil Procedure 44.4(d).[10] To impose attorney's fees the court must find that a party was obstinate, that he was stubbornly litigious, prolonging the duration of the suit or causing the plaintiff unnecessary inconvenience and expenses. *Soto* v. *Lugo*, 76 P. R. R. 416, 419 (1954). Although in most cases attorney's fees are assessed only against a losing party, the defendant acknowledges that ultimate outcome is not itself determinative of who should pay attorney's fees. There

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[9]The length of treatment and unemployment time is unclear in the record. Falu Benitez stated two different periods, 24 and 48 days.

[10]"Attorney's fees. Where a party has been obstinate, the court shall in its judgment impose on such person the payment of a sum of attorney's fees."

was no substantial doubt that the vessel was unseaworthy, and defendant was unable even to reach the jury on contributory negligence. Notwithstanding these facts, defendant neither stipulated to unseaworthiness nor made any offers of settlement.[11] Such conduct supports a finding of obstinacy. That the defendant ultimately prevailed against the third party defendant does not mitigate the nature of its behavior.

The trial court also awarded interest on the judgments from the dates on which the complaints were filed,[12] relying on Puerto Rican Rules of Civil Procedure 44.4(e).[13] This reliance was in error, for the cause of action arose prior to the Rule's effective date. The traditional common law rule does not allow prejudgment interest on unliquidated tort claims. *See Moore-McCormack Lines* v. *Amirault*, 202 F. 2d 893 (1st Cir. 1953) (discusses the rule but reserves judgment on it). However, we agree with the reasoning of the Second Circuit that even in the absence of a rule or

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[11]A settlement with the plaintiffs would not have precluded a subsequent suit for indemnity against the stevedoring contractor, *see, e.g., Tankrederiet Gefion A/S* v. *Hyman-Michaels Co.*, 406 F. 2d 1039 (6th Cir. 1969); *N. M. Paterson & Sons, Ltd.* v. *Nicholson Cleveland Terminal Co.*, 323 F. Supp. 913 (N. D. Ohio 1971), and the trial court found that defendant's attorneys were aware of this.

[12]Plaintiffs Virella Rivera, Cautres Roman, and Falu Benitez joined as plaintiffs in a complaint initially filed April 5, 1968. Valdiva's complaint was filed July 22, 1968.

[13]"(e) [Legal interest.] In all cases of money collection where the party has been obstinate the court shall impose on such person the payment of interest according to law, from the time in which there appeared cause of action and in case of damages, such payment of interest shall be imposed from the time the filing of the claim was made and computed on the acount of the judgment, except in the case where the defendant be the Commonwealth of Puerto Rico, its agencies, public corporations or the municipalities of Puerto Rico; *Provided, That the provisions of this subsection shall only apply to causes of action that may arise subsequently to the date of its approval.* [*May 26, 1967*]." (Emphasis added).

statute, a plaintiff's immediate loss and the usual delay in payment may warrant the granting of prejudgment interest. *Petition of City of New York,* 332 F. 2d 1006, 1008 (2d Cir.), *cert. denied,* 379 U. S. 922 (1964). This is notably true where a party has been determined to have been obstinate in its handling of the case. Although the Puerto Rican Rule was not applicable here, the reason behind the rule justifies the action taken by the district court.

The third party defendant raises several contentions on appeal, but in view of the stipulation with defendant to share damages (see note 2, *supra*), the stevedore concedes its objections are mooted by denial of a new trial of the primary action. We merely state, therefore, with respect to its allegation of error in the jury instructions, that the court appears to have overlooked the requirement of Rule 51, Fed.R.Civ.P., that parties state their objections following the charge rather than before. *See Bouley* v. *Continental Casualty Co.,* No. 71-1312 (1st Cir. Jan. 14, 1972); *Dunn* v. *St. Louis-San Francisco Ry. Co.,* 370 F. 2d 681 (10th Cir. 1966).

The judgment of the district court is affirmed with the exception of the award to Falu Benitez, which is vacated and the case is remanded for a new trial on that issue alone.

Denial of Petition for Rehearing by Court of Appeals

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 71-1258.

JOSE VIRELLA RIVERA ET AL.,
Plaintiffs, Appellees,

v.

REDERI A/B NORDSTJERNAN ET AL.,
Defendants and Third-Party Plaintiffs, Appellants,

v.

INTERNATIONAL
SHIPPING AGENCY INC. ET AL.,
Third-Party Defendants, Appellees.

No. 71-1259.

JOSE VIRELLA RIVERA ET AL.,
Plaintiffs, Appellees,

v.

REDERI A/B NORDSTJERNAN ET AL.,
Defendants and Third-Party Plaintiffs, Appellees,

v.

INTERNATIONAL
SHIPPING AGENCY INC. ET AL.,
Third-Party Defendants, Appellants.

ORDER OF COURT

Entered: April 11, 1972

It is ordered that the petition for rehearing filed on March 30, 1972, be, and the same hereby is denied.

By the Court:

/s/ Dana H. Gallup
Clerk

Puerto Rican Rules of Civil Procedure 44.4(d) and 44.4(e)

[10]"Attorney's fees. Where a party has been obstinate, the court shall in its judgment impose on such person the payment of a sum for attorney's fees."

[13]"(e) [Legal interest.] In all cases of money collection where the party has been obstinate the court shall impose on such person the payment of interest according to law, from the time in which there appeared cause of action and in case of damages, such payment of interest shall be imposed from the time the filing of the claim was made and computed on the amount of the judgment, except in the case where the defendant be the Commonwealth of Puerto Rico, its agencies, public corporations or the municipalities of Puerto Rico; Provided, That the provisions of this subsection shall only apply to causes of action that may arise subsequently to the date of its approval. [May 26, 1967]."

Excerpts from Testimony

[48] Q. And after you rigged the booms, what was the next thing that you did for the ship? A. To ask the boss what was to be done, because the 'tween-decks was empty. There was a refrigerator that was empty, and the others were loaded. To find out what was to be done, that we were told that what was to be done was to transfer a cargo from hold 4 to hold 5.

Mr. Ydrach: Objection, Your Honor.

The Court: Was that an instruction that you received?

A. Yes, because when we arrived at the ship——

The Court: No, please answer my question. Who told you that?

A. The boss.

The Court: Objection denied.

Q. Who is the bo's'un? A. He is the supervisor who orders the five foreman with their five gangs.

[49] Q. And after you found out that you were to transfer cargo from hold 4 to the 'tween-deck of hold number 5, what did you do? A. No, I was not told that, I was to change, that I was to receive cargo.

Q. From where did you receive the cargo? A. From hold number 4.

Q. What kind of cargo was it? A. There were some kind of cardboard boxes that weighed between 350 and 400 pounds.

Q. What did you do when you received the cargo? A. Prior to receiving it, the boss saw the first officer of the ship and informed him——

Mr. Ydrach: Objection. Your Honor admitted a short while ago that the bo's'un was, a supervisor told him, over my objection, but now the witness

intends to repeat a conversation between the ship's officer and the bo's'un. I object to that.

The Court: Please read that part of the answer to me, but not to the jury.

(The answer was repeated by the reporter.)

The Court: Was that conversation in your presence?

A. Yes.

The Court: Objection denied.

Q. What happened? A. He said he wanted that cargo in hold number 5, [50] then the first sling-load arrived, then when the first sling-load arrived we placed it in the entrance of the refrigerator because the first officer said he wanted it there, because he wanted the square to be clear.

* * *

[53] Q. Then what happened? A. We kept on working and a while later some of the men told me this is too much, then four of them came out to the square to get some air and five with the motormen stayed inside.

* * *

[69] Q. Do you know if it was being worked by hand in the hold without any fingerlife muffler? A. Normally, like all engines they throw a little bit up.

Q. I want to be sure that you answer my questions. Was it drawing smoke all through those two hours? A. It was running all the time.

Q. Was it just a little bit of smoke or later a lot of smoke? A. A small amount, but the truth is that inasmuch as that place was closed and there was only a small door about six feet high and four and a half or five feet wide, that was the only thing there.

* * *

Excerpts from Testimony

[75] Q. Now, that odor of the gasoline, did it start to be felt since the fingerlift started working? A. No, sir, a while later, I had said about an hour later, that's when I went to the officer, I want to tell you this, excuse me, and with the permission of the Court, when there are eight men working in a hold and if something happens they stop and I cannot force them to go on working.

* * *

[221] Q. And during the two odd hours, about two hours or so that you worked there, the fingerlife was throwing out some smoke? [222] A. Yes, sir.

Q. And all the time that it was working it was throwing some smoke? A. Throwing out smoke.

* * *

[242] Q. How long were you working before something unusual happened? A. About three-quarters of an hour or an hour.

Q. What was it that happened? A. What happened was, after they put that fingerlift in there, about five minutes later that they started operating it, it kept on throwing out smoke. Then we, the ones that were working there, we started feeling something like a sort of dizziness. Then the four of us that were working inside the refrigerator would come out and the four that were out would go in the refrigerator and we kept changing places for a while.

Q. And then what happened? A. We kept feeling this state of dizziness and some of us felt like vomiting, and we called the foreman, Balloon and told him that was too rough and we asked him to see if he could get that the fans be started to get the smoke out of there in order to keep on working.

Excerpts from Testimony

Q. Then what happened? A. Then he told us, wait a minute, let me see what I can do, and he went aboard on deck, I would say that maybe he went up there to talk to one of the bosses to see if they would start it.

Q. And then what happened? A. Then he came down again.

[243] Q. Were the fans started? A. No, they did not start, they started, yes, they started, but kind of slow.

Q. How long did you keep on working there after they started? A. About an hour or an hour and a half.

Q. Then what happened? A. Then that they had to take us up, because Balloon had to go in and get us out, the ones that were dizzy.

Q. Were you inside when Balloon went in to get them out? A. Yes, sir.

Q. At that moment, how did you feel? A. I was quite dizzy.

Q. Did you feel anything besides dizziness? A. I had much saliva in my mouth and I felt like vomiting.

Q. For how long did you feel that way before you were pulled out? A. All the time that we were in there, because I did not have a watch with me, so I don't know how much time.

* * *

[251] Q. And then what happened? A. Then the foreman went up to see if a fingerlift could be brought in to lift up the bundles.

Q. And after the fingerlift was brought aboard and operated for a time, what happened to you? A. After the finger started operating, it was very hot inside the refrigerator. Then it was throwing off smoke. A while later we felt like dizziness, nausea and our eyes had cloudiness.

* * *

[391] Mr. Ydrach: Strike the question out then.

Excerpts from Testimony

Q. When a foreman gives you orders, do you obey them? A. We obey him provided that they are not damaging to us.

* * *

[413] Q. Before that happened, don Elias, when you complained to the foreman about the smoke and the heat what did he do? A. Yes.

Q. What did he do? [414] A. He said that the air had to be put on. If they put air it was so slight that we could not feel it.

COPY

Supreme Court, U. S.
FILED
AUG 3 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. ~~39~~ 72-39.

JOSE VIRELLA RIVERA, PABLO CANTRES and ANTONIO FALU BENITEZ,
PLAINTIFFS-RESPONDENTS

v.

REDERI A/B NORDSTJERNAN and AXEL AXELSON JOHNSON,
DEFENDANTS AND THIRD PARTY PLAINTIFFS-PETITIONERS,

v.

INTERNATIONAL SHIPPING AGENCY, INC. and COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK,
THIRD PARTY DEFENDANTS-RESPONDENTS

JOSE VALDIVIA,
PLAINTIFF-RESPONDENT,

v.

REDERI A/B NORDSTJERNAN and AXEL AXELSON JOHNSON,
DEFENDANTS AND THIRD PARTY PLAINTIFFS-PETITIONERS,

v.

INTERNATIONAL SHIPPING AGENCY, INC. and COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK,
THIRD PARTY DEFENDANTS-RESPONDENTS.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Counter-Statement of the Case

The four respondents, longshoremen working in the hold of the M/V BRASILIA, were poisoned on August 23, 1966, by carbon monoxide. At the request of a ship's officer a gasoline driven fork-lift was placed in a lower hold to assist in the shifting of cargo into a reefer compartment. About one hour after the work with the fork-lift was in progress, these longshoremen and the other members of their gang complained to their hatch foreman of nausea and dizziness. Work was temporarily halted when the foreman went top-side to confer with the mate.

The vessel had ventilating fans or blowers which were controlled in the ship's engine room, a location inaccessible to the longshoremen. After assurance that the ventilating system would be turned on, and after it was in fact turned on, the foreman ordered a resumption of work. Within an hour after the work was resumed, the four plaintiffs-respondents[1] were simultaneously overcome.

From their opening statements to the jury and thereafter, throughout the trial, counsel for both shipowner and stevedore conceded that the vessel was rendered unseaworthy. Both defendants and third party defendants tried to place the blame on each other for the damages caused to plaintiffs-respondents. The shipowner's theory was that the stevedore's choice of equipment was faulty, and that its foreman, desirous of working his men at a pace above the normal so that a larger profit could be realized, failed to take the necessary precautions for the safety of his men and was hence, incompetent. The stevedore, in turn, contended that it was the ship's duty to supply ventilation and when the ship's officer, who controlled the ventilation

[1] A fifth longshoreman, Elias Noa, was also overcome. He testified at the trial as a witness but never brought suit.

from the engine room, assured the foreman that there would be sufficient air, the stevedore had a right to rely on that representation.

All hypothetical questions posed to expert witnesses contained the assumption that the injured longshoremen were working *under orders* and in reliance on the ship's ventilation. Plaintiffs' motion for a directed verdict at the end of their case was denied. When the motion was renewed at the end of the entire case, defendants' counsel opposed, arguing that either the negligence of the foreman was imputable to the longshoremen, or that they had assumed the risk, which counsel equated with comparative negligence. In the Court of Appeals, petitioners argued that the evidence indicated that the plaintiffs-respondents were contributorially negligent because they knowingly exposed themselves to dangerous conditions.

After viewing the evidence most favorably to the petitioners herein, the Court of Appeals found that the district court committed no error in refusing to allow the issue of comparative negligence to go to the jury because "... the plaintiffs *did* complain of the condition, were told the problem would be remedied, and were ordered to continue working... To say the plaintiffs were contributorially negligent in these circumstances would be to state that in continuing work they assumed the risk of obeying orders. We will not allow assumption of risk to masquerade as contributory negligence". 456 F.2d at 974. (Emphasis in original).

Now for the first time the exonerated shipowner[2] raises a constitutional issue in the present petition and seeks certiorari.

---

[2] The apparently anomalous situation of a seemingly indemnified shipowner seeking reversal is explained by the Court of Appeals in footnote 2 of its opinion, 456 F.2d at 973. It is noteworthy that the stevedoring contractor has not joined in the petition and has been made a respondent.

Reasons for Denying the Writ

Plaintiffs-respondents submit that the decision of the Court of Appeals for the First Circuit (a) is in harmony with the applicable decisions of this Court, (b) does not conflict with the decisions of other Courts of Appeals in the field of Maritime Law, (c) presents no issue of constitutional law on the right to trial by jury, and (d) does not subject petitioners to punitive liabilities but conforms to the broad equitable powers inherent in the Admiralty courts.

(a) *The Opinion Below Is in Harmony With Applicable Decisions Of This Court*

Whatever vigor the doctrine of assumption of risk retains after the advent of workmens' compensation law, there can be no question that it has no place in the field of Maritime Law, especially when the vessel is, as in this case, concededly, unseaworthy. *Socony-Vacuum Oil Co.* v. *Smith,* 305 U.S. 424, 59 S. Ct. 262, 83 L. Ed. 265 (1939); *Mahnich* v. *Southern S.S. Co.,* 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561, (1944).

Both of those cases involved seamen, one suing under the Jones Act, 46 U.S.C. 688, and the other under the general Maritime Law theory of unseaworthiness. Longshoremen who are entitled to the same non-statutory protection as are seamen ever since this Court's decision in *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946), *rehearing denied,* 328 U.S. 878, 66 S. Ct. 1116, 90 L. Ed. 1646, are also immune from the defense of assumption of risk. *Palermo* v. *Luckenbach SS Co.,* 355 U.S. 20, 78 S. Ct. 1, 2 L. Ed. 2d 3, (1957), *modified,* 355 U.S. 910, 78 S. Ct. 337, 2 L. Ed. 2d 271 (1958).

Mr. Justice Holmes pointed out many years ago that

where assumption of risk was outlawed as a defense by statute, it crept back into the cases under the alias of contributory negligence. In *Schlemmer* v. *Buffalo R. & P.R. Co.*, 205 U.S. 1, 27 S. Ct. 407, 51 L. Ed. 681, (1907) after cataloging the several different meanings of the phrase "assumption of risk" as it appeared in the cases, he concluded by saying:

> "If a man not intent on suicide, but desiring to live, is said to be chargeable with negligence as a matter of law when he miscalculates the height of a car behind by an inch, while his duty requires him, in his crouching position, to direct a heavy drawbar moving about him into a small slot in front, and this in the dusk, at nearly nine of an August evening, it is utterly impossible for us to interpret this ruling as not, however unconsciously, introducing the notion that to some extent the man had taken the risk of the danger by being in the place at all. But whatever may have been the meaning of the local courts, we are of the opinion that the possibility of such a minute miscalculation, under such circumstances, whatever it may be called, was so inevitably and clearly attached to the risk which Schlemmer did not assume, that to enforce the statute requires that the judgment be reversed."
>
> 205 U.S. at p. 14.

In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610, (1943), this Court tried to inter the doctrine of assumption of risk, at least in the railroad industry as it had in the maritime field, abetted as it was in both instances by Congressional legislation. In so doing, it noted the confusion that had often existed, even in the decision of this Court between the terms "assumption of risk" and "contributory negligence". These defenses were

part of the panorama of devices afforded expanding industry to avoid the consequences of the dangerous work at the expense of the life and limbs of the injured workers. Whatever justification existed for such doctrines under the common law, they were never adopted by the admiralty, especially when the shipowner provided an unseaworthy vessel.

But even at common law, this Court early recognized that a worker was neither contributorially negligent, nor did he assume the risk of a defective appliance, when he had been assured by his employer that the defect would be remedied. *Hough* v. *Texas and Pacific Railroad Company,* 100 U.S. 213, 25 L. Ed. 612 (1879). The Court never retreated from this position, following it in *Kane* v. *Northern Cent. Ry. Co.,* 128 U.S. 91, 9 S. Ct. 16, 32 L. Ed. 339 (1888) and *Delaware L. & W. R. Co.* v. *Converse,* 139 U.S. 469, 11 S. Ct. 569, 35 L. Ed. 213 (1891). In all the other cases cited by the petitioner, either there was a danger "so imminent or manifest to prevent a reasonably prudent man from risking it upon a promise or assurance by the proper authority that the cause from which the peril arose might be removed", *District of Columbia* v. *McElligott,* 117 U.S. 621, 6 S. Ct. 884, 29 L. Ed. 946 (1886), or there were sharp evidentiary disputes of fact, making a submission to the jury necessary. *Davidson Steamship Co.* v. *United States,* 205 U.S. 187, 27 S. Ct. 480, 51 L. Ed. 764 (1907), *Richmond & D.R. Co.* v. *Powers,* 149 U.S. 43, 13 S. Ct. 748, 37 L. Ed. 642 (1893); *Dunlap* v. *Notheastern R. Co.,* 130 U.S. 649, 9 S. Ct. 647, 32 L. Ed. 1058 (1889). There was no disputed fact in the instant case and reasonable men could not possibly infer negligence in reliance upon assurances that ventilation would be provided or in obedience to orders of superiors where there was no apparent danger.

Seaboard A.L.R. Co. v. *Horton,* 239 U.S. 595, 36 S. Ct. 180, 60 L. Ed. 458 (1961) is an excellent illustration of the confusion between assumption of risk and contributory negligence. When denied an instruction on the issue of assumption of risk, the railroad requested an instruction on contributory negligence. It had offered some evidence that the victim should have used a different method of releasing steam from the boiler. A charge on contributory negligence was given but the request that plaintiff be found guilty of contributory negligence as a matter of law was denied. This Court commented upon the alleged failure to properly charge as follows:

> "It is insisted that the trial court erred in refusing to instruct the jury that plaintiff was guilty of contributory negligence as a matter of law. This, also, is based upon the ground of the obvious and imminent nature of the danger to plaintiff arising out of the absences of the guard glass. But the reasonable reliance of the employee upon the employer's promise to repair the defect is as good an answer to the charge of contributory negligence as to the contention that the risk was assumed". 239 U.S. at 600.

Just as in *Horton, Hough* and all the other ancient cases, the petitioners have been trying to equate the term contributory negligence with assumption of risk. Therefore, the decision in the district court and the Court of Appeals are both in perfect harmony with this Court's pronouncements and are in keeping with the humanitarian doctrine of unseaworthiness. It would be sad indeed, if the owner of an unseaworthy vessel could avoid, even partially, his duties of defending on the ground that the injured longshoreman should not have obeyed the orders of his superior or relied upon the assurance of a ship's officer that the unseaworthy condition would be corrected.

(b) *There is No Conflict Among the Circuits*

Most recently, the Court of Appeals for the Fifth Circuit had occasion to pass upon two similar[3] cases of carbon monoxide poisoning to longshoremen. The defense of comparative negligence was not mentioned in either opinion, but "operational negligence of a fellow servant" was raised. *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S. Ct. 514, 27 L. Ed. 2d 562 (1971). One case, *James* v. *Sea Land Service, Inc.*, 5 Cir. 1972, 456 F.2d 221, was tried to the court alone; the other, *Carey* v. *Lykes Bros. Steamship Company, Inc.*, 5 Cir. 1972, 455 F.2d 1192, was tried to a jury. Summary affirmances, without oral argument,[4] of the plaintiffs' verdicts were entered.

Obedience, even to an "unreasonable" order, is not negligence. *Darlington* v. *National Bulk Carriers,* C.C.A. 2d 1946, 157 F. 2d 817. The Court of Appeals for the Second Circuit held in *Albanese* v. *N.V. Nederl. Amerik Stoomv. Maats.*, 2 Cir. 1965, 346 F. 2d 481,[5] another case strikingly similar to the case at bar, that there was no evidence that the plaintiff was aware of the danger, or indeed had any choice of action if he were. In that case, just as in this one, the trial court refused to allow the issue of contributory negligence to go to the jury.

The petitioner relies upon the Second Circuit case of *Misurella* v. *Isthmian Lines, Inc.*, 2 Cir. 1964, 328 F. 2d 40. If *Misurella* and the *Albanese* cases presented identical fact situations, one would, perforce, have to be in error.

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[3] A major difference appears to be that in Alabama someone tests for carbon monoxide concentration; in Puerto Rico no one even bothers to do that.

[4] Rule 18, 5 Cir., Rules United States Court of Appeals, 28 U.S.C.A.

[5] Reversed on other grounds, 382 U.S. 283, 86 S. Ct. 429, 15 L. Ed. 2d 327 (1965), rehearing denied 382 U.S. 1000, 86 S. Ct. 534, 15 L. Ed. 2d 490 (1966).

But *Misurella* was aware of the danger; had been ill for a period of more than an hour; and, he continued working while his fellow workers stopped. Thus, some evidence of comparative negligence was present. On the other hand, *Albanese* had no advance warning and was working in obedience to orders. So, too, the plaintiffs-respondents herein stopped work and only resumed work after being assured that the ventilation was functioning. They had no advance warning after resuming work until they all suddenly collapsed. The factual distinction allows for the jury issue in one case and the absence of it in the other.

The Court of Appeals for the Third Circuit reversed a case where the issue of comparative negligence was improperly submitted to a jury. In *Paluch* v. *Erie Lackawana Railroad Company*, 3 Cir. 1968, 387 F. 2d 996, it said at page 999:

> "He (plaintiff) was justified in relying on the experience of his superior, Mr. Brickman, who was in complete control of the work crew. Mr. Brickman indicated to appellant that he had tested the pole and found it to be safe. As it turned out, the stub pole, as well as the main pole, was rotted below the surface level. If Mr. Brickman, a man of experience, did not discover the defect, there is no ground to assert that the appellant was contributorially negligent on the basis that he did not find the pole defective, a contention advanced by the Railroad. Certainly, it is not contributory negligence to fail to discover a danger when there is no reason to apprehend one. From the evidence presented at the trial of this case, a jury could not properly find a lack of due care by the appellant. It was, therefore, fundamental and prejudicial error for the District Court to charge the jury on the issue of contributory negligence and its

diminishing effect upon any verdict it might find in favor of appellant." (footnotes omitted, parenthetical material added).

That Court has affirmed those principles consistently. *Smith* v. *Lauritzen,* 3 Cir. 1966, 356 F. 2d 171, *Eichmann* v. *Dennis,* 3 Cir. 1965, 347 F. 2d 978, *Moore* v. *Smith,* 3 Cir. 1965, 343 F. 2d 206; *Morran* v. *Pennsylvania Railroad Company,* 3 Cir. 1963, 321 F. 2d 402; *O'Neill* v. *Reading Company,* 3 Cir. 1962, 306 F. 2d 204; *Klimaszewski* v. *Pacific-Atlantic Steamship Co.,* 3 Cir. 1957, 246 F. 2d 875.

The case of *Mroz* v. *Dravo Corporation,* 3 Cir. 1970, 429 F. 2d 1156, relied upon by petitioner, was distinguished on its facts by the Court below.

In the Fourth Circuit, the rule of law is the same as expressed in the lower court's opinion herein. *Smith* v. *United States,* 4 Cir. 1964, 336 F. 2d 165; *Ballwanz* v. *Isthmian Lines, Inc.,* 4 Cir. 1963, 319 F. 2d 457.

The decision in *Dubose* v. *Matson Navigation Company,* 9 Cir. 1968, 403 F. 2d 875 is distinguishable by the single phrase "under conditions known to be dangerous." *Dubose* knew of the condition for more than two months and his superiors were unaware of it. However, the same court has held that where the plaintiff-longshoreman was only obeying orders and unaware of the dangers, "the damages recoverable by the plaintiff are not subject to any reduction because of any negligence on his part." *Adams* v. *United States,* 9 Cir. 1968, 393 F. 2d 903, 906.

(c) *There is No Issue of Constitutional Law*

Paraphrasing this Court's language in *Galloway* v. *United States,* 319 U.S. 372, 389, 63 S. Ct. 1077, 1086, 87 L. Ed. 1458, (1943), *rehearing denied,* 320 U.S. 214, 63 S. Ct. 1443, 87 L. Ed. 1851 (1943), if the petitioners' contention

is that a federal judge has no power to direct a verdict for insufficiency of evidence because of the Seventh Amendment to the Constitution, the short answer is that the contention has been foreclosed by repeated decisions made in this Court for more than a century and a half. The practice is explicitly approved by this Court in its adoption of Rule 50, Federal Rules of Civil Procedure, 28 U.S.C.A.

In dissent in *Galloway,* Mr. Justice Black said at page 407 of the official citation:

> "As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy."

That more stringent test was applied by the trial judge. (A. 5-6 of Petitioners' Appendix).

A half-century earlier this Court said in *Sparf* v. *United States,* 156 U.S. 51, 99-100, 15 S. Ct. 273, 292, 39 L. Ed. 343, (1895):

> "The law makes it the duty of the jury to return a verdict according to the evidence in the particular case before them. But, if there are no facts in evidence bearing upon the issue to be determined, it is the duty of the court, especially when so requested, to instruct them as to the law arising out of that state of the case. So, if there be some evidence bearing upon a particular issue in a cause, but it is so meager as not, in law, to justify a verdict in favor of the party producing it, the court is in the line of duty when it so declares to the jury."

This issue of a violation of a Constitutional right was not raised in either court below and is not even properly before this Court.

(d) *Pre-Judgment Interest and Counsel Fees May Be Awarded Under Admiralty Law.*

Counsel fees, although authorized by statute in cases of obstinacy under Puerto Rican law[6], are recognized in admiralty law as equitable relief to be given when the situation so demands. *Vaughan* v. *Atkinson*, 369 U.S. 527, 82 S. Ct. 997, 8 L. Ed. 2d 88, 1962, *rehearing denied*, 370 U.S. 965, 82 S. Ct. 1578, 8 L. Ed. 2d 834 (1962).

The award of pre-judgment interest was justified by the Court of Appeals, not on the basis of local law, but upon admiralty principles. The Circuits are in agreement on this point and the uniformity of the admiralty law is served by the recognition of this right. *Petition of City of New York*, 2 Cir. 1964, 332 F. 2d 1006; *cert. denied, sub nom. City of New York* v. *Bernstein*, 379 U.S. 922, 85 S. Ct. 277, 13 L. Ed. 2d 335 (1964); *Gardner* v. *National Bulk Carriers, Inc.*, 4 Cir. 1964, 333 F. 2d 676; *National Air Lines, Inc.* v. *Stiles*, 5 Cir., 1959, 268 F. 2d 400, *cert. denied*, 361 U.S. 885, 80 S. Ct. 157, 4 L. Ed. 2d 121, (1959), *rehearing denied*, 361 U.S. 926, 80 S. Ct. 291, 4 L. Ed. 2d 241 (1959).

Conclusion

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari herein be denied.
August 2, 1972.

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[6] 32 L.P.R.A. Appendix §44.4(d).

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—against—

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Third Party Defendants-Respondents

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Plaintiff-Respondent

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—against—

INTERNATIONAL SHIPPING AGENCY, INC. and COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK,
Third Party Defendants-Respondents

PETITIONERS' BRIEF IN REPLY

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PETITIONERS' BRIEF IN REPLY

STATEMENT

Petitioners believe it desirable to submit a short reply to pinpoint the issues in the light of Respondents' brief in opposition.

A comparison of the briefs submitted in support of and in opposition to the Petition reveals:

(1) There is no dispute as to the accuracy of the questions as presented in the Petition.

(2) There are few, if any, fundamental differences as to the material facts.

DISPUTED POINTS

(a) In support of their position that there was no jury issue of contributory negligence, Respondents place great reliance on the language of the Court of Appeals to the effect that on the day of their accident, they complained of working conditions, were assured that remedial action would be taken and were ordered to continue working (Respondents' brief, p. 3). What Respondents apparently fail to acknowledge is that *identical fact patterns* were previously presented to this Court in *District of Columbia* v. *McElligott,* 117 U. S. 621 (1886); *Kane* v. *Northern Central Railway Co.,* 128 U. S. 91 (1888) and *Seaboard Air Line* v. *Horton,* 239 U. S. 595 (1916), and in each the issue of plaintiff's contributory negligence was held to be a question of fact for the jury. Petitioners here seek no more than just that. Certainly the authority of these decisions cannot be ignored by Respondents nor their stature diminished by an off-hand reference to ". . . all the other ancient cases", especially where not one single authority to the contrary has been cited.

(b) The two recent decisions cited by Respondents, *James* v. *Sea Land Service Inc.,* 456 F. 2d 221 (5 Cir., 1972) and *Carey* v. *Lykes Bros. Steamship Company, Inc.,* 455 F. 2d 1192 (5 Cir., 1972) are wholly inapposite. They were concerned solely with the question whether longshoremen overcome by carbon monoxide could be denied *any* recovery on an "operational negligence" defense theory, as explained in *Usner* v. *Lukenback Overseas Corp.,* 400 U. S. 494 (1971). Neither case even mentions the question of contributory negligence.

(c) At page 9 of their brief, Petitioners make the astonishing statement that they stopped working at the time

they complained; resumed work only after being assured that the ship's ventilation system was functioning and had no advance warning after resuming work until they all suddenly collapsed. This simply does not conform to the statement of facts set forth by the Court of Appeals and quoted on page 4 of the Petition and makes no allowance for the additional testimony quoted verbatim in Petitioners' appendix.

(d) Respondents attempt to side-step Petitioners' contention that the allowance of $10,000 counsel fees on the basis of the statutory law of Puerto Rico was an unauthorized grafting of a substantive right onto the General Maritime law. Instead of meeting this issue, Respondents cite *Vaughan* v. *Atkinson,* 369 U. S. 527 (1962) in support of a general proposition that counsel fees are recognized in admiralty as equitable relief when appropriate. Petitioners submit that no attempt was made by either of the Courts below or by Respondents to justify the award in this case on the basis of the strict test laid down in *Vaughan* nor do they answer the point raised by the Petition that recoverable damages in an action based on a maritime tort cannot be augmented by local statutes, *Canova* v. *Travelers Insurance Company,* 406 F. 2d 410 (5 Cir., 1969); *Moore-McCormack Lines* v. *Amirault,* 202 F. 2d 893, 897 (1 Cir., 1953).

Respectfully submitted,

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